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91-1606

Supreme Court, U.S.
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DOCKET NUMBER ____
UNITED STATES SUPREME COURT
1991-92 TERM

THE PEOPLE OF THE STATE OF NEW YORK,

- against -

GUSTAVE ZURAK,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

PETITION AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

FIRST: Did the Trial Court's refusal to have the People provide a Bill of Particulars more specifically narrowing the time frame of the act alleged in the indictment violate Defendant's Sixth and Fourteenth Amendment rights to have notice of the nature and cause of the accusation against him and to due process?

SECOND: Did the Trial Court's evidentiary rulings which excluded material evidence crucial to the defense deprive defendant of his Sixth Amendment right to call witnesses in his defense and deprive him of a fair trial in violation of the Fourteenth's

Amendment guarantee of due process of law?

LISTING OF ALL PARTIES

1. The People of the State of New York
2. Gustave Zurak

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28 UNITED STATES CODE SECTION 1257

NEW YORK CRIMINAL PROCEDURE LAW SECTION 470.05

COURT RULES

SUPREME COURT RULE 10

REFERENCES TO REPORTS OF PREVIOUS OPINIONS IN CASE

There was no report at the trial level. The Appellate Division decision is reported as People v. Zurak, 168 AD2d 196 (3d Dep't 1991). The Court of Appeals decision denying leave to appeal has not been reported as of this date.

JURISDICTIONAL STATEMENT

Date of Entry of Judgments

A judgment was entered in the County Court of Albany County, State of New York convicting defendant of the crime of three counts of sexual abuse in the first degree. Defendant appealed to the Appellate Division, Third Department of the Supreme Court of New York which modified the judgment below on June 6, 1991, by dismissing two counts of the indictment, but affirming the conviction on the third count.

Defendant then sought discretionary review of the remaining conviction in the New York Court of Appeals, the state's highest court. Permission to appeal was denied on December 16, 1991.

Statutory Provision Conferring Jurisdiction on this Court

Petitioner seeks a writ of certiorari pursuant to Title 28 of the United States Code sec. 1257(3).

Constitutional Provisions Relied On

Petitioner seeks a writ of certiorari pursuant to the following provisions of the United States Constitution:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation, . . . to have compulsory process for obtaining witnesses in his favor . . . ." United States Constitution Amendment VI.

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ." United States Constitution Amendment XIV, section 1.

STATEMENT OF THE CASE

Gustave Zurak was arrested on May 26, 1988, by the Town of Colonie Police Department and charged with three counts of Sexual Abuse in the First Degree; one a violation of New York Penal Law section 130.65(1) and two violations of Penal Law section 130.65(3). Defendant was convicted after a jury trial on all three counts on August 26, 1989.

As part of defendant's pre-trial motions, defendant requested an Order requiring the district attorney to provide a bill of particulars giving specific dates, times, etc. of the alleged offenses.(Record, V. I, p. 9) Count 1 in particular, the count at issue here, involved an alleged nineteen year old victim, but the indictment only specified "sometime during the Spring of

1986." (Record, V.I, p. 5) The Trial Court denied defendant's motion for further particulars stating they were "set forth with sufficient particularity in the indictment."(Record, V. I, p. 28A)

Defendant took the stand at trial and denied any improper conduct with either of the alleged victims. Defense counsel attempted to have defendant testify to incidents prior to the criminal allegations where the complaining witness exhibited anger or animosity toward defendant; the prosecutor's objection that such testimony was "irrelevant" was sustained by the Trial Court.(Record, V. III, pp. 383-84) The prosecutor then stated in summation that the complaining witness had no motive to falsify. (Record, V. III, p. 514).

The defendant called a number of

witnesses who were to testify that the complaining witness on count one had intimidated the complaining witness on the remaining counts to make her accusation. These witnesses would have testified to incidents between the two witnesses prior to the making of the accusations which would have established that the older witness had control of the younger and further would have borne on the older witnesses' character and bias toward defendant. The Trial Court refused to allow such testimony from four different witnesses, constantly sustaining objections that such testimony was "irrelevant". (Record, V. III, pp. 316-321, 329-332, 339-340, 344-45, 358-363)

On August 26, 1989, the jury returned verdicts of guilty on all three counts of the indictment. On

September 22, 1989, defendant was sentenced to 1 to 3 years on each count, sentences to run consecutively. Defendant appealed. On June 6, 1991, The New York Supreme Court, Appellate Division Third Department, modified the judgment of conviction by dismissing two counts of the indictment, but affirming the conviction on a third count. Defendant sought discretionary review of the remaining conviction in the state's highest court, the Court of Appeals. On December 17, 1991, Judge Alexander of the court denied permission to appeal.

Points in Record Where Federal Questions Were Raised

POINT I

Petitioner moved for a Bill of Particulars in the pre-trial Omnibus motion on the basis of a lack of specificity in the indictment (Record, V.I., p. 5). The motion was denied by the Trial Court which stated that the items were set forth "with sufficient particularity in the indictment" (Record, V.I., p. 24). The issues were fully briefed in the appellate court (Point II of Appellant's Brief) which relied on cases which specifically stated the issue was a federal consitutional one.

POINT II

Petitioner questioned the defendant as to any incidents where the complaining

witness exhibited anger or hostility. This evidence was ruled irrelevant (Record, V.III, pp. 383-384). Petitioner also tried to present testimonies of four witnesses as to the older complaining witness' activities toward the other complaining; this evidence was ruled irrelevant (Record, V. III, pp. 316-321, 329-332, 339-340, 344-345, 358-363). Defense counsel specifically stated during a side bar motion that not being allowed to present this evidence violated defendant's right to a fair trial (Record, V.III, p. 319). Both issues were fully briefed in the appellate court (Point V of Appellant's Brief) which asserted that these errors denied the right to a fair trial.

ARGUMENT

POINT I

The Trial Court's Refusal to Have the People Provide a Bill of Particulars More Specifically Alleging the Time of the Act Alleged in the Indictment Violated Defendant's Right to Have Notice of the Cause and Nature of the Accusation Against Him and Due Process

The acts and intents making up a crime "must be set forth in the indictment with reasonable particularity of time, place and circumstances." United States V. Cruikshank, 92 US 542, 558, 23 L.Ed. 588, 593, (1875). See also United States v. Hess, 124 US 483, 8 S. Ct. 571, 31 L. Ed. 516 (1888). A criminal defendant is entitled to a Bill of Particulars where the indictment does not charge him with sufficient particularity

to enable him to properly prepare a defense and to avoid prejudicial surprise at trial. Cefalu v. United States, 234 F2d 522, 524 (10th Cir. 1956). The failure to supply a bill of particulars where the indictment states an excessive time period or to correct the time period by way of another indictment has been held to be reversible error. State v. Hicks, 666 SW2d 54 (Tennessee, 1984); State v. Miller, 319 So.2d 339 (Louisiana, 1975).

Count 1 of the indictment (the only count at issue here) states, in pertinent part, "defendant, sometime during the Spring of 1986 . . . did subject another person to sexual contact by forcible compulsion."(Record, V. I, p. 5) The defendant moved for further specifics as to dates, etc. of the allegation contained in this count by way of a Bill

of Particulars.(Record, V. I, p. 9) The Trial Court denied defendant's motion, stating the items were "set forth with sufficient particularity in the indictment."(Record, V. I, p. 28A) This finding was upheld on appeal by the Appellate Division, Third Department of the New York Supreme Court. People v. Zurak, 168 AD2d 196, 200 (3d Dep't 1991). New York's highest court, the Court of Appeals, denied permission to appeal.(A-13). It is submitted to this Court that to compel a defendant to go to trial on an allegation concerning a single act crime against an adult victim with a time frame no more specific than "sometime in the Spring of 1986," violates defendant's constitutional right to be informed of the nature and cause of the accusation and fundamental due prccess of law.

Numerous State and Federal courts

have found error where the accusatory instrument or the evidence at trial failed to provide time frames far less expansive than the three months in this case. For example, in Winslow v. State, 45 So.2d 339 (Florida, 1949), the Florida Supreme Court reversed a sodomy conviction where the District Attorney admitted the evidence could not specify the date of the alleged act within a twenty day period. Accord State v. George, 69 Wisc 2d 92, 230 NW2d 253 (1975) (one month to four month time periods in various counts of the indictment: "[e]ch count covers an expansive period of time without stating at what point or points during that period the alleged crimes were committed." Id. at 99, 230 NW2d at 257); Daniels v. State, 156 So2d 14 (D.C. Florida, 1963)(witness could not

positively identify month of alleged crime). At least one court has ordered the government to inform a defendant whether the alleged crime occurred in the morning, afternoon or evening when the indictment provided a specific date. United States v Giramonti, 26 FRD 168 (D.C. Conn. 1960). The Winslow and George decisions cited above were decisions of those states highest courts. The fact that other State courts of last resort have decided this question contrary to the determination of the New York courts in this case is a compelling reason for this Court to grant certiorari. See Supreme Court Rule 10(.1)(b).

The alleged victim in this crime was nineteen years old at the "time" (such as it is) of the alleged incident and twenty-one years old when she made the

accusation. Petitioner has not found a single case where a time period of more than a day contained in an accusatory instrument has been held to be adequate notice in a case with an adult "victim". Neither have the People or the State courts cited one. While conceding that in cases involving children more flexible standards in determining what notice is "reasonable" and what particularity "sufficient" may be appropriate, the circumstances in this case show the virtual impossibility of preparing an adequate defense when the "victim" is unwilling or unable to provide any meaningful time frame to the accusation, and further, where the complaint was not filed until approximately two years after the alleged incident.

Petitioner preserved his claim under New York law when he moved unsuccessfully

for a Bill of Particulars for "a party who without success has . . . sought or requested a particular ruling . . . is deemed to have thereby protested the Court's ultimate disposition of the matter." NY Criminal Procedure Law sec. 470.05. The New York cases cited in Appellant's Brief in the Appellate Division specifically state that the issue of whether a charging instrument gives adequate notice to the defendant is not a state issue but an issue concerning a fundamental right under the Sixth Amendment. People v. Morris, 61 NY2d 290, 294-95 (1984)(citing numerous federal and Supreme Court decisions establishing the right); People v. Keindl, 68 NY2d 410, 417 (1986)(quoting United States v. Cruikshank, supra). Thus, petitioner has at all stages asserted his federal constitutional right to adequate notice

of the crime charged, an element of both the right "to be informed of the nature and cause of the accusation" under the Sixth Amendment and to due process of law under the Fourteenth Amendment.

This Court has never specifically dealt with the issue as to what temporal guidelines are appropriate in an indictment charging a single act crime on an adult "victim". Other State courts of last resort and Federal courts have imposed far more stringent requirements as to the allowable time periods in an indictment than the New York courts applied in this case, at least requiring Bills of Particulars be supplied to narrow expansive time frames. As the issue is a fundamental one and critical to defendants rights under the Sixth and Fourteenth Amendments, this Court should grant a writ of certiorari and make a

determination on these issues after being fully briefed and hearing oral argument.

POINT II

The Trial Court's Evidentiary Rulings Which Excluded Material Evidence Crucial to The Defense Deprived Defendant of a Fair Trial in Violation of his Sixth Amendment Right to Call Witnesses in his Defense and the Fourteenth Amendment's Guarantee of Due Process of Law

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 US 284, 294 (1973). The right to offer material testimony is basic to due process of law. In re Oliver, 333 US 257 (1948). Fundamental fairness is the standard by which a Trial Court's

evidentiary rulings are measured against when they exclude material evidence offered by the defense. Pennsylvania v. Ritchie, 480 US 39, 56, 107 S. Ct. 989, 999, 94 L.Ed.2d 40 (1986)(plurality opinion).

At trial, the defendant was not allowed to testify as to incidents which occurred between himself and the complaining witness where she exhibited anger and/or animosity toward him, the Trial Court sustaining the prosecutor's objection that such testimony was irrelevant. (Record, V. III, pp. 383-384). The Trial Court also refused to allow testimony by four witnesses that the older complaining witness dominated and intimidated the younger witness in the time period immediately preceding the making of the accusations, again finding such testimony irrelevant. (Record, V.

III, pp. 316-21, 329-32, 339-40, 344-45, 358-63). It is submitted to this Court that the blanket exclusion of such critical testimony bearing on the credibility of the only witness against the defendant on this count, was so fundamentally unfair that it violated due process of law.

"Where evidence tends, in any way, even indirectly, to prove a defendant's innocence, it is error to deny its admission." Moreno v. State, 418 So2d 1223, 1225 (Fla. App. 1982). Testimony concerning the bias of a witness toward the defendant is always relevant to that witness' credibility. Thus, the Trial Court was clearly incorrect in ruling the testimony "irrelevant". Further, the testimony here was to be presented by the defendant himself and this Court has stated that there is a higher standard

necessary to exclude evidence from a defendant than from a witness. Rock v. Arkansas, 483 US 44, 56, 107 S. Ct. 2704, 2711, 97 L.Ed2d 37 (1987). The exclusion of evidence of bias and/or hostility was clearly prejudicial, as this case boiled down to a simple credibility contest between the witness and defendant. The fundamental unfairness of the exclusion was further illustrated when the prosecutor, after successfully objecting to every defense attempt to show that the accusation was motivated by hostility or bias, stated in summation: "what motive could she possibly have to tell anything but what happened to her? None." (Record, V. III, p. 514). Such fundamental unfairness violates due process of law.

Case law has established the right to obtain witnesses under the Sixth Amendment encompasses more than merely

ensuring their attendance; the Amendment means that defendant "Has the right to present his own witnesses to establish a defense." Washington v. Texas, 388 US 14, 19, 87 Sup. Ct. 1920.1923, 18 L.Ed2d 1019 (1967). The Trial Court's exclusion of any testimony concerning the older complainant's behavior toward the younger complainant in the time period immediately preceding the accusations gutted the testimony of four defense witnesses making them useless to establishing the defense. Moreover, as the credibility of the complaining witness was absolutely critical to the case the such testimony would have been highly relevant in establishing a possible motive for her to fabricate the allegation and would have borne on her character. Defendant has a Sixth Amendment and due process right to bring

out information that would show bias on the part of a witness. Davis v. Alaska, 415 US 308 (1974). This right was violated by the Trial Court to such a degree that the defendant was effectively denied his right to call witnesses in his defense under the Sixth Amendment.

Defendant preserved these issues by timely offer of evidence at the trial and by specifically stating: "my not being allowed to pursue this avenue of examination is hampering my client's right to a fair trial. . . I will discontinue questioning of this witness but with great objection" (Record, V. III, p. 319). The Trial Court's practice of sustaining every objection as to the relevance of this testimony, but stating it was not precluding any line of questioning was clearly disingenuous and does not preclude review. The issues were

also fully briefed in Petitioner's and Respondent's papers in the Appellate Division. Defense counsel clearly stated that he was relying on defendant's fundamental right to a fair trial based on being allowed to use testimony which established his defense.

For all the reasons cited above, defendant's trial lacked the fundamental fairness required by the constitutional requirement of due process of law. This court should grant certiorari and render a decision on these issues after full briefing and oral argument.

SUPREME COURT - APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

Decided: June 6, 1991 60745

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent

v

OPINION AND ORDER

GUSTAVE ZURAK,

Appellant

Calendar Date: April 26, 1991

Before: Mahoney, P.J., Levine, Mercure, Crew III and Harvey, JJ.

Martin Brickman, Albany, for appellant.

Sol Greenberg, District Attorney (David M. Freedman of counsel), Albany, for respondent.

Levine, J.

Appeal from a judgment of the County

Court of Albany County (Keegan, J.), rendered September 22, 1989, upon a verdict convicting defendant of three counts of the crime of sexual abuse in the first degree.

Defendant's indictment on three counts of sexual abuse in the first degree arose out of complaints in May 1988 to a police officer of the Town of Colonie, Albany County, by a then 21-year-old woman regarding an incident that occurred in the spring of 1986, and by her 12-year-old sister regarding two incidents occurring in August 1987, when defendant forcibly touched their private parts. Defendant was the employer of the complainants' mother and they and the other members of their family had been living in defendant's home. According to the officer who took their statements,

the older complainant was verbally describing to him the sexual molestation to which she was subjected when the younger sister entered the room, began to cry and stated that defendant had done the same thing to her on two occasions. Following a jury trial, defendant was convicted on all three counts of the indictment, representing the three instances of abuse involving both complainants. He received consecutive sentences of 1 to 3 years' imprisonment on each count. This appeal followed.

After reviewing the record, we have concluded that there was insufficient competent evidence to sustain the convictions of defendant on the second and third counts of the indictment, charging him with the two instances of sexual abuse of the younger complainant

in August, 1987. The younger complainant recanted her accusation against defendant before the trial and was unwavering on the witness stand in denying the truth of her initial statement to the police, although she did admit to making the statement. The police officer to whom the younger complainant made the original accusation was permitted, over objection, to described in detail what she told him regarding the defendant's forcible sexual touching. Then, the prosecution called as a witness a psychological expert on child sexual abuse who testified that the younger complainant exhibited various traits, including recantation, that were indicative of having been sexually abused.

In our view, none of the foregoing evidence can be considered affirmative

proof of defendant's guilt. The People are plainly wrong in contending that, as a prompt outcry of a sexual attack, the younger complainant's original accusatory statement to the police is admissible evidence-in-chief of defendant's commission of the crimes. Assuming, arguendo, that a statement given in May 1988 regarding sex offenses committed in August 1987 qualifies as a prompt complaint, it would still not constitute evidence of defendant's guilt. The New York rule as originally adopted and consistently applied thereafter is that recent outcry evidence in sex crime trials is admissible as a heresay exception solely for a limited purpose, i.e., "to rebut the adverse inference (on the veracity of the complainant's testimony) a jury would inevitably draw

if not presented with proof of a timely complaint" (People v Rice, 75 NY2d 929, 931; see, Baccio v People, 41 NY 265, 268).

Thus, had the younger complainant given testimony inculpating defendant, her statement to the police would have been admissible, if at all, only to bolster her veracity. It would not under any circumstances have been affirmative evidence of defendant's guilt. "The rule (regarding recent outcry), however, is carefully guarded. Such declarations are not evidence per se of the facts in issue; they cannot be relied upon for any purpose, except to confirm the testimony of the injured female" (Braccio v People, supra; see, Richardson, Evidence Sec. 292, 519, at 263, 511 [Prince 10th ed]; Note, A Matter of Time: Evidence of a

Victim's Prompt Complaint in New York, 53 Brooklyn L Rev 1087, 1093-1094). We decline to follow the People's urging to abandon the New York rule in favor of one which has been applied in several other states, permitting under certain circumstances the introduction of heresay accusations by victims in child sexual abuse prosecutions. The decisions from other jurisdictions cited by the People in support of this argument rest upon application of statutory liberalizations of the rules of evidence not codified in this State (see, e.g., State v Allred, 134 Ariz 274, 655 P2d 1326; People v Winfield, 160 Ill App 3d 983, 513 NE2d, 1032, lv denied 117 Ill 2d 552, 517 NE2d, 1094).

Similarly unavailing as evidence-in-chief to establish defendant's guilt of

molesting the younger complainant was the opinion testimony of the People's psychological expert. The nature of that testimony was essentially that of "validation evidence" which would have been admissible in Family Court in a child sexual abuse proceeding under Family Court Act article 10 to corroborate an out-of-court statement of the victim (see, Matter of Nicole V., 71 NY2d 112, 121). In upholding the admissibility of such opinion evidence in Family Court child sexual abuse cases, the Court of Appeals noted that, in contrast to criminal proceedings, heresay statements of a child victim are statutorily admissible (see, id., at 117-118) and, also by statute, are sufficient to support a finding of abuse if corroborated by "'[a]ny other evidence

tending to support the reliability of the previous statements'" (id., at 124 [emphasis in original], quoting Family Ct Act Sec. 1046 [a] [vi].

The statutory authority to permit validation evidence in Family Court Act article 10 cases to corroborate heresay statements of the child victim is absent here. We are also not presented with the use of validation evidence to corroborate in court testimony of a child victim, as permitted in criminal prosecutions in some other state (see, Matter of Nichole V., supra, at 121), nor with the use of psychological opinion evidence relevant to some specific element of the sex crime charged (see, People v Keindl, 68 NY2d 410, 422).

The only other evidence against defendant on the second and third counts

of the indictment cited by the People is the younger complainant's testimony of the presence of defendant at the times she had described in her prior statement when the acts of sexual abuse allegedly occurred. Since, however, she denied in her court testimony that any acts of sexual abuse occurred, the presence of defendant during crimes the commission of which the People failed to prove added nothing to the prosecution's case. Accordingly, the convictions for counts two and three must be reversed and those counts dismissed.

We, however, find no reason to disturb the conviction of defendant for sexually abusing the older complainant as charged in the first count of the indictment. The allegation in that count that the offense occurred "sometime during the

Spring of 1986, at 26 Hillcrest Avenue, in the Town of Colonie, County of Albany" was, under the circumstances, legally sufficient notice to defendant (see, People v Du Boy, 150 AD2d 882, 884, lv denied 74 NY2d 846; see also, People v Keindl, supra, at 419). We are also unpersuaded by defendant's contention that County Court erred in not excusing for cause the jurors who voiced misgivings as to sitting on a child sexual abuse case, since none of the jurors expressed any preconceived notion of defendant's guilt (see, People v Wales, 138 AD2d 766, 769, lv denied 72 NY2d 868). We have considered defendant's remaining points for reversing the conviction on count one and find them equally unpersuasive.

Mahoney, P.J., Mercure, Crew III and Harvey, JJ., concur.

ORDERED that the judgment is modified, on the law, by reversing defendant's convictions on counts two and three of the indictment and dismissing said counts, and, as so modified, affirmed.

ENTER:

Michael J. Novack
Clerk

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. FRITZ W. ALEXANDER, II
ASSOCIATE JUDGE

THE PEOPLE OF THE
STATE OF NEW YORK,

Respondent,

against

GUSTAVE ZURAK,

Appellant.

CERTIFICATE DENYING LEAVE

I, FRITZ W. ALEXANDER, II, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied, and the order of June 19, 1991,

granting a stay of execution is accordingly vacated.

Dated at New York, New York

December 16, 1991

Associate Judge

*Description of Order: Order of the Appellate Division, Third Department, entered on June 6, 1991, modifying on the law, the judgment of the County Court, Albany County, rendered September 22, 1989, by reversing the convictions on counts two and three of the indictment, and dismissing said counts, and affirming the said judgment as so modified.